SUPREME COURT, U. S.

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No. 57

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN PATRICK HENRY, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 559

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-10a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 2, 1958. A petition for rehearing was denied on November 4, 1958. The petition for a writ of certiorari was filed on December 4, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

"Admiral" shipping label showing that they were being shipped to Cincinnati (R. 13). Stadmiller then told petitioner and Pierotti that "the cartons looked like they had been stolen" and he asked them if they "would come down to the office" (R. 14, 25). Petitioner and Pierotti said the cartons were in the car when they borrowed it but they consented to go with the agents (R. 14, 24). After learning that the cartons of radios had been stolen from the Ziffrin Truck Lines, the agents placed petitioner and Pierotti under arrest at about 5:00 p.m. (R. 12, 16, 17).

The motion to suppress was denied by the trial court and the case was set for trial (R. 32, 34).

2. The testimony as to the actions of the defendants prior to the stopping of the car, the statements of petitioner when the car stopped, the observation of the cartons and the statements by defendants that the cartons were in the car when it was borrowed were repeated at the trial in testimony by agent Oitszinger (R. 51-57). In addition, Wilbur Holtz testified that about noon on the day of the arrest he loaned his car to petitioner and that at that time there were no "Admiral" cartons in it (R. 37-39). The value of the merchandise and the fact of theft from an interstate shipment were stipulated (R. 35).[1]

[1] Wallace Nunes and Joseph Teodorczyk, dock hands at the Ziffrin Truck Lines, testified that, on the morning of the arrest, Pierotti helped to load a shipment of "Admiral" cartons, similar to the ones found in petitioner's possession, on to a Ziffrin trailer bound for Cincinnati (R. 39-51). Mr. Nunes testified that Pierotti left work at 1:30 that day (R. 41). This testimony was admitted against Pierotti only (R. 41, 47).

At the close of the government's case, motions for judgments of acquittal as to both petitioner and Pierotti were denied by the trial court (R. 71) and they were convicted (R. 72-75).

ARGUMENT

Petitioner devotes much of his argument to a discussion of whether the arrest occurred at the time the agents intercepted the car in which he was riding or at some time thereafter. He argues that, because (1) the arrest took place when the car was stopped and (2) probable cause was then lacking, the arrest and the ensuing search and seizure were illegal (Pet. 11-15). In emphasizing the question of when the arrest occurred, petitioner misconceives the government's position and the holding of the court below. As the dissenting judge below noted (Pet. 8a), "Counsel for the Government stated in oral argument before this court that when the federal agents stopped the defendants' car the arrest of the defendants occurred right then and there". Although the point is arguable (see *Jordan* v. *United States*, 254 F. 2d 710 (C. A. 8); *Gilliam* v. *United States*, 189 F. 2d 321 (C. A. 6); cf. *Brinegar* v. *United States*, 338 U. S. 166, 178 (concurring opinion of Mr. Justice Burton)), we adhere to the government's concession below. We urge, however, that the crucial question is not the time of the arrest but whether probable cause existed at the time the car was stopped, for federal agents have no authority, under the circumstances of this case[2] to stop an automobile unless

[2] Cf. *Brinegar* v. *United States*, 338 U. S. 160, 183 (dissenting opinion of Justice Jackson).

probable cause exists at the time of stoppage. The court below recognized this, and properly applying the "reasonable man" test promulgated by this Court in *Brinegar* v. *United States*, 338 U. S. 160, held that agents Stadtmiller and Oitszinger in fact had probable cause to stop the automobile. If, as the court held, such probable cause existed, the statements of petitioner and his co-defendant and the personal observations of the agents clearly justified their belief that the fruits of the crime they believed petitioner to have committed were contained in the automobile and sanctioned the search of the car and seizure of the stolen property. Thus, the crucial issue presented by the petition is not the abstract question of what constitutes a technical arrest but whether, on the facts of this case, the quantum of information available to the agents constituted probable cause.

The co-defendant Pierotti's employer, an officer of a freight company, had furnished F. B. I. agent Stadtmiller with "information concerning the implication of the defendant Pierotti with interstate shipments" (R. 21). Agent Stadtmiller had had a conversation with Pierotti and petitioner, but a defense objection as to the nature of the conversation was sustained (R. 21). On the day of the arrest, agents

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[illegible] (p. 6, [illegible]) "[e]very traveler may be [illegible] suspicion of an officer's whim or mere suspicion, [illegible] the facts as to the agents' knowl[illegible] [illegible] suspicion and *constituted* [illegible] *in stopping appellants' car*" (emphasis added).

of the F.B.I. were cruising about looking for leads to a theft of whiskey from an interstate shipment (R. 15, 16, 21, 51). Agents Stadtmiller and Oitszinger observed Pierotti and petitioner walking across the street from the Red Top Tavern in the neighborhood of the whiskey theft (R. 15, 18). Pierotti and petitioner entered a car parked nearby and drove to an alley where they parked (R. 19, 51, 52). The agents followed the car and observed petitioner get out of the car, enter a gangway, and return to the car in a few minutes carrying cartons (R. 19, 52). The car, with Pierotti driving, drove off and the surveilling agents lost contact with it. The agents returned to the Red Top Tavern and observed that the car they had been following was again parked across from the tavern and was unoccupied (R. 19). The agents parked their car and observed Pierotti and petitioner return to the car. They were not carrying anything. Pierotti again drove the car with the petitioner to the same alley where the car stopped, the petitioner got out, and went to the gangway, returning with cartons (R. 20, 53). Pierotti and petitioner drove off and were followed by the agents who, suspecting their implication in the whiskey theft,[4] interrupted and stopped their car (R. 12, 22, 54).

Taking all these circumstances together, the majority of the court below correctly concluded that the agents had probable cause for stopping the car under the decisions of *Brinegar v. United States*, 338

[4] Petitioner's trips to and from the tavern were particularly significant since the tavern might have been an outlet for the disposal of stolen liquor.

U. S. 160; *Carroll* v. *United States*, 267 U. S. 132; and *Husty* v. *United States*, 282 U.S. 694.

If, as we have shown, probable cause existed for believing that petitioner was guilty of the theft from an interstate shipment of cases of liquor, it is, of course, immaterial that the theft detected involved radios. Cf. *Harris* v. *United States*, 331 U. S. 145. The legality of the arrest must be measured by the beliefs the arresting agents actually and reasonably entertained, but if the arrest is based on probable cause, the fruits or instruments of any crime the defendant has in fact committed are subject to seizure in the search incident to that arrest.

The events that occurred thereafter—the observation of the sealed cartons destined for Cincinnati, the statements by defendants as to their previous whereabouts shortly before, which the agents knew from personal observation to be untruthful—added to the previous knowledge which the agents had and were clearly sufficient to confirm the agents' belief that petitioners had committed a felony and that the stolen goods were in the automobile. The agents thus had a proper basis for searching the car and seizing the cartons.

2. The sufficiency of the evidence to support the conviction does not present an issue warranting review by this Court. The government's case against petitioner did not rest merely on the presumption arising from recent possession of stolen property. When stopped, petitioner jumped out of the car and yelled to Pierotti, "Hold it, it's the G's" and "Tell them you just picked me up". (R. 23, 54). Petitioner

denied that he had just been to the Red Top Lounge and that he had been in the alley where the agents observed him pick up the cartons (R. 57). He also stated that he did not know whose car he was riding in and that when he got into the car the cartons were already there (R. 56, 57). Wilbur Holtz testified that earlier that day he had met petitioner in the Red Top Lounge, that he loaned him his car and that there were no cartons in the car at that time (R. 36-39). This evidence showed a consciousness of guilt which the trier of fact was justified in crediting and which, together with the presumption, supports the conviction.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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